# A cautionary tale for all those dealing with flexible working requests

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**A delay in hearing an appeal against a refusal to permit an employee to work flexibly left an employer facing an Employment Tribunal claim. Find out what happened and learn how not to make the same mistakes.**

**What happened in this case?**

The claimant worked for Network Rail. He submitted a flexible working request on 11 February 2019. This meant that Network Rail had until 10 May 2019 to decide whether to accept or reject the request. This "decision period" includes the completion of any appeal process. The claimant's request was rejected on 7 March 2019 and an appeal was submitted on 13 March 2019. Through no fault of either party, there was a delay in fixing the appeal hearing and it did not take place before the end of the decision period.

On 24 June 2019 the claimant agreed that the appeal hearing should go ahead on 1 July 2019. However, the next day, he launched a Tribunal claim alleging various breaches of the flexible working legislation, including that the process had not been completed before the expiry of the decision period. The internal appeal hearing went ahead on 1 July 2019, and the appeal was dismissed on the same day.

The Employment Tribunal dismissed the claimant's claims on the basis that they had been made prematurely. The Tribunal said the claimant's agreement to hold the appeal hearing on 1 July 2019 meant he had also agreed to extend the decision period itself. Here, the logic was that an appeal has to take place within the decision period, therefore, agreeing an appeal hearing date outside the decision period equates to an agreement that the decision period be extended until at least

the same date (and possibly for a reasonable period time afterwards to allow for a decision to be reached). They said it would have been open to the claimant to have reserved his position on this point, but he had not done so.

The result was that the claim had been submitted before the expiry of the decision period and was premature, meaning the Tribunal did not have jurisdiction to hear the claims. The claimant appealed to the Employment Appeal Tribunal.

**What was decided?**

The key issue was whether the Tribunal had been correct to say that an agreement to attend an appeal hearing after the end of the decision period amounted to an agreement that the decision period itself should be extended.

The EAT held that an agreement to extend the decision period could be express or implied. However, it must be clear that there is such an agreement. Importantly, there was nothing implicit in an employee's agreement to attend an appeal hearing that meant that he must have agreed to an extension of the decision period.

The EAT rejected Network Rail's argument that there would be no point in attending an appeal hearing if the decision period was not also extended. Holding an appeal hearing outside of the decision period might resolve the parties' differences and avoid a Tribunal hearing or, at least, narrow the issues in dispute. If it did not resolve matters, then the claimant was entitled to pursue a claim for compensation for breach of the flexible working rules.

The EAT decided there had been no agreement to extend the decision period and, therefore, the claim was not premature and could proceed.

**What does this decision mean for employers?**

Strictly speaking, there is no obligation to offer a right of appeal in relation to a flexible working request decision. However, if you do offer one, then you are obliged to notify the employee of your decision on the appeal within the three-month decision period for concluding the process. Therefore, one simple way of avoiding the mess that the employer got itself into here could be not to offer a right of appeal at all. However, in practice, many employers choose to offer an appeal because they consider this the fair thing to do. Further, an appeal stage is recommended by the Acas Statutory Code of Practice on how to handle flexible working requests in a reasonable manner (which is taken into account by Employment Tribunals where relevant).

Where you do offer an appeal, then it is vital that the person in charge of that process diarises the expiry date of the decision period and works to complete the process by that point. Yet in the real world, it is not always possible to meet every HR deadline. This is a particular issue for employers at the moment who are juggling the challenges of COVID-19, sick and isolating staff and managing home working arrangements. If it becomes clear that the process won't be completed by the deadline, then you need to seek the employee's agreement to extend the decision period itself, ideally in writing. This agreement will be needed where the appeal hearing hasn't taken place (as in this case), but also where it has taken place, but the decision has not yet been notified to employee.

With a bit of careful planning, you can avoid ending up in the situation that Network Rail have found themselves in.

Walsh v Network Rail Infrastructure Limited.

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